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Supreme Court of the United States

OCTOBER TERM—1940.

No. 1051

THE AMERICAN TOBACCO COMPANY and
R. J. REYNOLDS TOBACCO COMPANY,
(Libellants-Appellees Below),

against

Steamship *Katingo Hadjipatera,* her engines, boilers, etc.,
and J. C., N. C. and A. C. HADJIPATERAS,
Respondents.

K. DIAMANTOPOULOS, Minister to the United States for
the Kingdom of Greece,
(Petitioner-Appellant Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CARVER W. WOLFE,
Proctor for Petitioner.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Steamship *Katingo Hadjipatera,* her engines, boilers, etc., and J. C., N. C. and A. C. HADJIPATERAS,
Respondents.

K. DIAMANTOPOULOS, Minister to the United States for the Kingdom of Greece,
(Petitioner-Appellant Below).

PETITION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of K. Diamantopoulos, Minister to the United States for the Kingdom of Greece for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows:

Statement of Matters Involved.

This is a proceeding in admiralty begun by the filing of a libel, for cargo damage, in the United States District Court for the Southern District of New York, by the American Tobacco Company, claiming damage in the amount of $185,000, and R. J. Reynolds Tobacco Company claiming damage in the sum of $200,000. The libel was *in rem* against the Steamship *Katingo Hadjipatera,* and *in personam* against J. C., N. C. and A. C. Hadjipateras, as owner and operator of the Steamship *Katingo Hadjipateras* with a writ of foreign attachment.

The vessel has been seized by the United States Marshal for the Southern District of New York, in this suit, and is now being held in custody by him, although it is urgently needed by the Greek Government to prosecute the war in which it is engaged.

By cable from the Greek Minister in London dated February 22, 1941 Captain Courbellis, Director of the Mercantile Marine Division of the Greek Consulate General, was notified that the Greek Steamer *Katingo Hadjipatera* had been requisitioned by the Greek Government (16, 28, 31, 58, 69 and 70) (references are to pages). Thereafter on February 25th, 1941, Captain Courbellis, by letter, notified the Master of the vessel that his vessel had been requisitioned by the Greek Government. (Exhibit B, attached to the Suggestion of Immunity (28); Exhibit 1 and translation thereof Exhibit 1-A (71). This notice was received by the Master of the vessel, Captain Skinitis, on the arrival of the vessel at Newport News on February 26th, 1941 and in a telephone conversation to Captain Courbellis on that same day, Captain Skinitis acknowledged receipt of the notice and accepted the requisition (23, 56, 73, 81 and 94).

The district court in its opinion which was adopted by the Circuit Court of Appeals (127) found:

> "On February 26, at about 3:15 Captain Courbellis was telephoned by Captain Skinitis and in that telephone conversation Captain Skinitis acknowledged the receipt of that notice of the requisitioning of his vessel and stated in effect that he would abide by it" (108).

After discharging the Newport News and Norfolk cargo, in accordance with the orders of Captain Courbellis, the vessel proceeded to New York, where she arrived on March 7th, 1941 (52).

On that day the libel herein was filed (11) and on March 13th, 1941, your Petitioner, the Greek Minister to the United States, made his representations with respect to sovereign immunity to the Secretary of State (23ff).

On March 14th, 1941, the Honorable Cordell Hull, Secretary of State of the United States, transmitted to the Attorney General of the United States the note of the Greek Minister, suggesting that the Attorney General instruct the appropriate United States Attorney to appear in the proceedings:

> "* * * without argument or comment on his part, other than to state that the statements of the Government of Greece made in its behalf by the Greek Minister at Washington are brought to the attention of the Court as a matter of comity between the Government of the United States and the Government of Greece" (22).

Thereafter, the United States Attorney for the Southern District of New York, under date of March 17th, 1941 filed a Suggestion of Immunity, stating:

> "• • • The undersigned presents this suggestion as a matter of comity between the United States Government and the Government of the Kingdom of Greece for such consideration as this Court may deem necessary and proper" (19-20).

On the same date Judge Leibell signed an order to show cause:

> "• • • why an order should not be made and entered herein dismissing the suit of American Tobacco Company and R. J. Reynolds Tobacco Company against the Steamship *Katingo Hadjipatera,* her engines, boilers, etc., and J. C., N. C. and A. C. Hadjipateras, and order wholly dismissing the above entitled suit for want of jurisdiction on the ground that said suit is brought against property of a friendly sovereign nation not subject to the jurisdiction of this court, and immune from suit in this court • • •" (13-14).

On March 31st, 1941, the Acting Secretary of State transmitted a note to the Attorney General, at the request of the District Court, in which it was stated:

> "The position of the Department as set forth in its letter of March 14, 1941 to you in regard to this vessel is similar to that which has been taken by it in other cases involving the question of the requisition of merchant vessels by foreign governments" (55).

On March 21st, 1941, affidavits of Henry N. Longley and John W. R. Zisgen were filed in answer to the order to show cause, denying:

> (1) "that the said suit is brought against the property of a friendly sovereign nation."

(2) "that there is any fact alleged, or attempted to be shown, in any of the papers served on these libellants with said order, or filed in this Court, which supports the statement in said order to show cause that the property proceeded against is immune from suit in this Court; * * *"

(3) "that the said Steamship *Katingo Hadjipatera* is not subject to the jurisdiction of this Court;"

(4) "that any fact whatever has been established in this cause which shows that J. C., N. C., and A. C. Hadjipateras, or their property are in any way immune from process of this Court" (35).

On March 21st, 1941, Captain Courbellis and John C. Monroe filed affidavits in reply to the answer to the order to show cause, denying certain of the allegations contained in the affidavits in support of the answer to the order (56-62).

Judge Leibell heard testimony on the issue:

"* * * whether or not the master was served with a notice that the vessel had been requisitioned by the Greek Government, and if so served, whether he took actual possession of the vessel on behalf of the Greek Government, and when and where and by what means he did so" (67).

The Government of the Kingdom of Greece produced as witnesses Captain Courbellis and Captain Skinitis on the evening of March 24, 1941 (63 ff.). At the conclusion of this testimony, Judge Leibell gave proctors for libellants one day after receipt of the transcript of testimony to determine whether further testimony would be taken on their behalf, directing the proctors for the libellants to

notify the proctors for the Greek Government whether such additional testimony was to be taken (104-105).

On the following morning, proctors for the libellants notified proctors for the Greek Government that no further testimony would be taken, and in accordance with Judge Leibell's directions, both parties appeared before him on the afternoon of March 25th, 1941 (106). At that time, Judge Leibell orally made his findings of fact and conclusions of law, the nub of which was that the vessel had been requisitioned as of the date of February 26th, 1941, when the said requisition was accepted by the master, but that the requisition was not to take effect until after the westbound cargo had been discharged (106 ff.). Upon these findings of fact and conclusions of law, Judge Leibell entered an order from which an appeal was taken (114 ff.) to the Circuit Court of Appeals for the Second Circuit.

The Circuit Court of Appeals on the 23rd day of April, handed down its decision, without writing an opinion, affirming the District Court on the opinion of the District Court. The opinion of the Circuit Court of Appeals is as follows:

"Judgment affirmed on opinion below" (127).

The order affirming the judgment of the District Court was entered on May 9th, 1941 (128).

The Steamship *Katingo Hadjipatera* is now still in the custody of the U. S. Marshal for the Southern District of New York, although the Kingdom of Greece is a friendly government and is in urgent need of the vessel to prosecute the war in which it is engaged. Grave damage is being done to the Greek Government in preventing the Steamship *Katingo Hadjipatera* from engaging upon its vital government service for the Kingdom of Greece. It is of the utmost

urgency that the action be vacated and the vessel released from arrest immediately so that it may proceed upon the business of the Greek Government.

Questions Presented.

1. Is a vessel which has been requisitioned by a friendly foreign sovereign government, which requisition has been recognized and accepted by her master and which vessel has entered into the service of the foreign government, free from suit in the courts of the United States?

2. Where an inbound vessel with a cargo aboard to be delivered in United States ports is requisitioned by a friendly foreign sovereign, prior to the delivery of the inbound cargo, and prior to the filing of any libel against said vessel for cargo damage, is the mere fact that the registered owners' agent assists the master in entering the vessel through the Customs, and that the vessel makes certain payments for ship's expenses out of funds supplied by the owner, and the further fact that no endorsement was made on the ship's papers referring to the requisition, sufficient to warrant the holding below that the friendly foreign sovereign, namely, the Greek Government, did not have actual "physical possession" of the vessel from the time that the requisition of said vessel was accepted by the vessel's master?

3. In order to obtain "physical possession" of a vessel requisitioned by a friendly foreign sovereign, is it necessary that the requisitioning friendly foreign power send a diplomatic or consular representative aboard such vessel?

4. Where the master of a vessel, requisitioned by a friendly foreign sovereign, accepts such requisition and acknowledges that he will abide by its terms, is not the master of such vessel then the representative of such requisitioning friendly sovereign and in "physical possession" of such vessel on behalf of the sovereign?

5. Is not the question whether a vessel which has been requisitioned by a friendly foreign sovereign is "in possession" of such sovereign, purely a question of law, and not one of fact?

6. The Circuit Court on undisputed evidence found that the Greek Government requisitioned the vessel. Has not the Circuit Court of Appeals failed to consider undisputed evidence before it, establishing that possession was taken by the Greek Government and that the vessel entered into the service of the Greek Government, with the result that under the decisions of this court a friendly foreign sovereign has been deprived of property to which it is entitled?

7. Has not the Circuit Court of Appeals, in view of the undisputed evidence before it erroneously decided that the Greek Government did not take possession of the vessel with the result that a friendly foreign sovereign has been unjustly deprived of its property?

8. Has not the Circuit Court of Appeals erroneously reached the conclusion from undisputed evidence that neither Captain Courbellis nor Captain Skinitis, Master of the *S. S. Katingo Hadjipatera,* took possession of the vessel on behalf of the Greek Government?

9. Has not the Circuit Court of Appeals misapplied the undisputed facts and arrived at an erroneous conclusion

of law on the question of possession with the result that a friendly foreign sovereign has been deprived of urgently needed property to which it is entitled?

Reasons Relied on for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals decides a question in conflict with applicable decisions of this Court such as *The Navemar,* 303 U. S. 68; *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562; *Ex Parte Muir,* 254 U. S. 522.

2. The Circuit Court of Appeals has erroneously decided an important question of admiralty and international law in conflict with the weight of authority.

3. The Circuit Court of Appeals has failed to draw the correct conclusion of law from the undisputed testimony before it with the result that a friendly foreign sovereign government has been improperly deprived of urgently needed property to which it is entitled.

4. The Circuit Court of Appeals by erroneously ignoring the undisputed testimony before it has decided a question of law which adversely affects the relations of this government with a friendly foreign sovereign.

5. The decision of the Circuit Court of Appeals involves an important question of maritime and international law, conflicting with the applicable principles of this Court, resulting in depriving a friendly foreign nation of possession of property to which it is entitled.

WHEREFORE, Petitioner prays that this Court issue a writ of certiorari to the United States Court of Appeals

for the Second Circuit, directing it to send to this Court in full, the transcript of records in the case entitled:

"The American Tobacco Company and
R. J. Reynolds Tobacco Company,
Libellants-Appellees,

—against—

Steamship *Katingo Hadjipatera,* her engines, boilers, etc., and J. C., N. C. and A. C. Hadjipateras,
Respondents.

K. Diamantopoulos, Minister to the
United States for the Kingdom
of Greece
Appellant.

October Term, 1940—No. 297."

and that the decision of said Circuit Court of Appeals entered on the 23rd day of April, 1941, and the order entered on the 9th day of May, 1941, be reversed and for such other and further relief as under the premises may be just.

Dated, New York, New York, May , 1941.

K. Diamantopoulos
Minister to the United States for
the Kingdom of Greece.

By .....
Counsel for Petitioner.

I hereby certify that I have examined the foregoing Petition and in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

.....
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM—1940.

No. .....

THE AMERICAN TOBACCO COMPANY and R. J. REYNOLDS TOBACCO COMPANY,
(Libellants-Appellees Below),

against

Steamship *Katingo Hadjipatera*, her engines, boilers, etc., and J. C., N. C. and A. C. HADJIPATERAS,
Respondents.

K. DIAMANTOPOULOS, Minister to the United States for the Kingdom of Greece,
(Petitioner-Appellant Below).

BRIEF FOR PETITIONER.

I. Opinions of the Courts Below.

The opinion of the District Court has not been officially reported. A copy of the opinion, however, is printed in the records at pages 106-112.

The Circuit Court of Appeals did not write an opinion. On the 23rd day of April 1941 it affirmed the decision of the District Court on the opinion of the District Court (127).

II. Jurisdiction of This Court.

Jurisdiction of this Court is under Section 240 of the Judicial Code as amended on February 13th, 1925, in U. S. Code, Title 28, 347, and under Article 3, Section 2, Clause 1, of the Constitution of the United States.

III. The Facts.

The facts are stated to a large extent in the foregoing petition and will not be repeated here. We will supplement the petition, however, by stating some of the facts somewhat more at length.

The Master of the Steamship *Katingo Hadjipatera* was notified by letter dated February 25th, 1941, while the vessel was at Newport News, Virginia, that it had been requisitioned by the Greek Government and he was specifically instructed in the notice of requisition to unload the cargo which he then had aboard and after that to sail to New York to take on a new shipment. The letter requisitioning the S.S. *Katingo Hadjipatera* was as follows:

> "* * * As soon as you have unloaded your present cargo, sail to the port of New York to take on this new shipment" (Exhibit B-28).

It is particularly to be observed that the letter of requisition immediately assumed control of the vessel. It specifically directed the master of the Steamship *Katingo Hadjipatera* as to what he was to do with the cargo he then had on board. It directed him to unload the cargo which was then aboard his vessel. It specifically directed the master as to what he was to do thereafter. It directed him to proceed to New York with the vessel there to take on a

cargo belonging to the Greek Government for transportation to Piraeus.

The master of the Steamship *Katingo Hadjipatera* acknowledged this requisition by telephone on February 26th, 1941, the day after it was sent to him by Captain Courbellis and the master then stated that he was holding his vessel subject to the requisition.

Captain Courbellis, testifying as to the conversation he had with the captain of the Steamship *Katingo Hadjipatera* on February 26th, 1941 said:

> "The Witness: He told me that the steamer, after he received the letter, is requisitioned and he told me he is pleased to go to Greece and when the steamer will be discharged he will come for loading because the steamer after Newport News had another two ports more for discharging. It was New York and Camden. I think Camden is the name exactly" (74).

The Greek Government from the time that it requisitioned the vessel had, and actually did exercise the right to direct the vessel's movements and its directions were obeyed. It directed the vessel to discharge its cargo and it directed the vessel thereafter to proceed to New York to take on a cargo belonging to the Greek Government for transportation to Piraeus. The vessel did follow the Greek Government's orders and was from that time on in the public service of the Greek Government and obeying the Greek Government's orders.

Captain Courbellis testified that, from that time on, he had the right to direct the vessel's movements. He testified:

> "Q. Now, Captain Courbellis, who, after the letter of February 25th, could direct the movements of the vessel?

Mr. Longley: I object to that.
A. I could" (86).

Captain Courbellis further testified:

> "Q. What conversation did you have with the captain on that point? A. Sir, the steamer arrived at New York loaded. The government wants the steamer to load it. Then she did not order the steamer loaded. She ordered the steamer to discharge as quickly as possible in order to load the steamer again. I told the captain to discharge, after the steamer will be discharged—that is written in my letter—to proceed to New York immediately and ask the instructions from our agent because we wanted the steamer empty; light" (87).

Captain Skinitis who was Master of the Steamship *Katingo Hadjipatera* testified that after having had the conversation with Captain Courbellis he took no orders from anyone else. He testified:

> "Q. Other than what you have told us, Captain, with respect to the conversation you had with Captain Courbellis, did you take any orders from anyone else other than Captain Courbellis?
> Captain Courbellis: Put the question again.
> Q. (Read). A. No" (94).

The Greek Government urgently needed the vessel for the purpose of carrying on the war in which it is engaged. The vessel with cargo aboard was useless to it. The Greek Government wished to have the cargo removed and accordingly directed that the cargo which was then aboard be delivered and that the vessel proceed to New York as soon as possible in order that the remaining cargo which was destined for New York and Camden might be removed and

the vessel put in condition to receive cargo which the Greek Government wished to have it carry. There was no necessity for the Greek Government to order the cargo to be dumped at Newport News or Norfolk, as that would no more have helped the situation than actually to deliver it.

There was no necessity for the Greek Government to order that the New York and Camden cargo be left at Newport News or Norfolk as the Greek Government wished to have the vessel come to New York in any event to pick up its war cargo and the cargo could be unloaded in New York as easily as at Newport News or Norfolk. Actually there was no opportunity for the vessel to dispose of the Camden cargo as she was arrested by the Marshal within a few minutes after her arrival at New York and has continued to this day and now is in the Marshal's custody.

There is no question but that the master of the Steamship *Katingo Hadjipatera* received the notice of requisition on February 26th, 1941.

There is no question but that the Master was ordered by the Greek Government under the requisition to discharge the vessel's cargo.

There is no question but that the Master was ordered by the Greek Government to proceed to New York.

There is no question but that the Master recognized the requisition and acted under it, and acknowledged that he would abide by it. As the District Court said in its opinion:

> "On February 26, at about 3:15 Captain Courbellis was telephoned by Captain Skinitis and in that telephone conversation Captain Skinitis acknowledged the receipt of that notice of the requisitioning of his vessel and stated in effect that he would abide by it" (108).

There is no question but that the libel in this case was not filed until some ten days after February 26th, that is on March 7th, after the vessel had made the voyage from Newport News and Norfolk to New York (108).

POINT I.

A vessel of a friendly sovereign government in its possession and service is immune from suit in Courts of Admiralty of the United States.

The rule of law set forth above is recognized and has been frequently asserted. *Berizzi Bros. Co.* v. *The Pesaro*, 271 U. S. 562. *Compania Espanola, Etc.* v. *The Navemar*, 303 U. S. 68. In *The Navemar, supra*, this Court said:

> "The decree of attachment without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum*, actual possession by some act of physical dominion or control in behalf of the Spanish Government, was needful, The Davis (United States *v.* Douglas) 10 Wall, 15, 21, 19 L. ed. 875, 877; Long *v.* The Tampico (C.C.) 16 F. 491, 493, 494; The Attualita (C.C.A. 4th) 238 F. 909, *supra;* The Carlo Poma (C.C.A. 2d) 259 F. 369, 370, reversed on other grounds in 255 U. S. 219, 65 L. ed. 594, 41 S. Ct. 309, or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government. Both were lacking as was support for any contention that the vessel was in fact employed in public service. See Long *v.* The Tampico, *supra* (C.C.), 16 F. 493, 494; cf. Berizzi Bros. Co. *v.* The Pesaro, 271 U. S. 562, 70 L. ed. 1088, 46 S. Ct. 611, *supra.*"

Insofar as the Steamship *Katingo Hadjipatera* is concerned the facts are quite different from the facts in *The Navemar, supra.*

In the present case the Greek Government exercised dominion over the Steamship *Katingo Hadjipatera* by directing it to proceed to New York, as soon as it had unloaded its cargo (Exhibit B-28) and the Master of the vessel recognized that he was controlling the vessel on behalf of the Greek Government. As the District Court found in its opinion:

> "• • • in that telephone conversation, Captain Skinitis acknowledged the receipt of that notice of the requisitioning of his vessel and stated, in effect, that he would abide by it" (108).

From the moment the vessel was requisitioned it was in the public service of the Greek Government, for it was under directions to discharge its cargo with the utmost speed so that a new cargo for the Greek Government might be put aboard. As Captain Courbellis said:

> "I told the Captain to discharge, after the steamer will be discharged—that is written in my letter—to proceed to New York immediately and ask the instructions from our agent because we wanted the steamer empty; light" (87).

The failure of the lower court to recognize the fact that the vessel was in the possession and service of a friendly foreign sovereign and, therefore, immune from suit in the admiralty courts of the United States, was a violation of the principles of law recognized by this court in *The Navemar, supra, The Pesaro, supra,* and other similar cases.

The libellant, in the Circuit Court of Appeals, in referring to *The Navemar, supra,* made point of the fact that no Greek Consular officials had done any act purporting to take possession of the vessel and that none of the Consular officials had informed the Master that they wished to take possession or had any intention of doing so.

We submit that in these things, *The Navemar* does not establish an absolute rule as to what must be done or what must not be done to take possession of a vessel and we further submit that the Greek Government officials whether consular or not did perform acts taking possession of the vessel and did take possession and assume control of it.

The libellant in the Court below made point of the fact that the vessel had proceeded under the command of her master from Norfolk to New York with cargo belonging to private persons and that she was manned by her officers and crew presumably in the employ of private owners.

The vessel did proceed to New York under the command of her master and manned by her officers and crew because she was specifically directed by the Greek Government to proceed to New York and because the master himself was directed by the Greek Government to take her there and informed Captain Courbellis that he would do so.

The libellant made point of the fact that the master allegedly acted under instructions from ship's agents and ship's insurers in discharging the cargo and that demand had been made in the name of her former owners for general average security.

The Greek Government was not in the steamship business. It naturally would not be equipped to perform the various acts that ship's agents could perform and it would naturally leave the details of loading, unloading, general average, etc., to persons other than itself. Even if these

things were performed by persons other than the Greek Government they were not controlling. On the questions of whether the Greek Government had taken possession of the vessel, the controlling facts are that the vessel had already been requisitioned by the Greek Government and that the master of the vessel had recognized the requisition and proceeded to act for the Greek Government under it.

The Greek Government was prepared to pay the bills incurred on behalf of the vessel and had set aside a fund of $25,000 for that purpose. Captain Courbellis testified that he had received from the Greek Government the sum of $25,000 for the expenses of the Steamship *Katingo Hadjipatera*. He stated:

> "Q. Have you agreed on behalf of the Greek Government, to bear any of the expense for these matters to which I have referred? A. I have not any order to pay these bills. The only thing I know till now is that the Government sent me $25,000 at the Guaranty Trust Company for expenses of 'Katingo Hadjipatera'. The Government did not tell me yet, instructions, for what to pay, to pay these bills or bills which will provide after. I have $25,000 special for 'Katingo Hadjipatera' at the Guaranty Trust Company" (83).

The important thing to consider is not the details as to who actually discharged the cargo, who employed the ship's chandlers, who arranged for wharfage, etc., but rather the fact that the master, before the vessel was libeled, received orders requisitioning the vessel, acknowledged that he would serve under those orders and actually did act as directed by the orders and was in possession of the vessel for the Greek Government.

POINT II.

The prayer of the petitioner should be granted.

To take the view that what was done by the Greek Government and by the ship's master did not amount to requisition and taking possession of the vessel and having it enter the public service of the Greek Government is to take a view that is narrow and entirely unwarranted. We submit that complete dominion was exercised over the vessel by the Greek Government and that her captain took her over for the Greek Government and that she was in the Greek Government's possession and actually entered into the Greek Government's service from the moment of the requisition.

We submit that it would be a wrong to a friendly foreign sovereign government if the vessel were permitted to be sued. We submit that it is a wrong which is against the interests and policies of this Government and its foreign relations.

It is respectfully submitted that a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing it to send to this court in full, the transcript of the records in the case, should be granted, and that the decision of the said Circuit Court of Appeals, entered on the 23rd day of April 1941 and the order entered on the 9th day of May, 1941, be reversed.

CARVER W. WOLFE,
Proctor for Petitioner.

MAY 23 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1051.

K. DIAMANTOPOULOS, Minister to the United States for the Kingdom of Greece,

Petitioner,

—against—

THE AMERICAN TOBACCO COMPANY and R. J. REYNOLDS TOBACCO COMPANY, *et al.*,

Respondents.

MEMORANDUM IN OPPOSITION TO THE MOTION OF K. DIAMANTOPOULOS FOR IMMEDIATE DETERMINATION OF HIS APPEAL.

T. CATESBY JONES,
HENRY N. LONGLEY,
Proctors for Respondents, The American Tobacco Co., and R. J. Reynolds Tobacco Co.

Supreme Court of the United States

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Respondents.

MEMORANDUM IN OPPOSITION TO THE MOTION OF K. DIAMANTOPOULOS FOR IMMEDIATE DETERMINATION OF HIS APPEAL.

Petitioner, K. Diamantopoulos, Minister to the United States for the Kingdom of Greece, has given notice that the Court will be asked to determine, before adjournment of the present term, whether a writ of certiorari is to issue in this case. Naturally, respondents are satisfied to have the Court pass upon the petition for a writ at any time that it may desire. In accordance with the request of counsel for petitioner, we have not delayed the filing of our brief in opposition to the granting of the writ: it is now on file.

If this Court determines to pass upon the petition for a writ forthwith, and if it should decide that the questions presented should be considered by the Court, no doubt it is within the Court's power to decide the questions presented, as petitioner requests, without oral argument, without additional briefs and without following the pro-

cedure which normally accompanies the granting of such a petition. However, the brief which we have filed is merely in opposition to the granting of the writ.

Our own view is that the questions presented are of considerable importance and should not be decided finally without being fully briefed and argued.

The affidavit of Carver W. Wolfe, Esq., filed in support of the motion, sets out considerable argument on the merits of the controversy between the parties. We do not deem it necessary or appropriate in this memorandum to submit any discussion on the merits of the cause in addition to that set out in our brief in opposition to the granting of the writ.

Respectfully submitted,

T. CATESBY JONES,
HENRY N. LONGLEY,
Proctors for Respondents, The American Tobacco Co., and R. J. Reynolds Tobacco Co.

FILED
MAY 23 1941
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IN THE

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K. DIAMANTOPOULOS, Minister to the United States for the Kingdom of Greece,
(Petitioner-Appellant Below).

BRIEF ON BEHALF OF THE AMERICAN TOBACCO COMPANY AND R. J. REYNOLDS TOBACCO COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

T. CATESBY JONES,
HENRY N. LONGLEY,
Proctors for The American Tobacco Company and R. J. Reynolds Tobacco Company.

JOHN W. R. ZISGEN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1051.

THE AMERICAN TOBACCO COMPANY and R. J. REYNOLDS TOBACCO COMPANY,
(Libellants-Appellees Below),

—against—

Steamship "KATINGO HADJIPATERA", her engines, boilers, etc., and J. C., N. C. and A. C. HADJIPATERAS,
Respondents.

K. DIAMANTOPOULOS, Minister to the United States for the Kingdom of Greece,
(Petitioner-Appellant Below).

BRIEF ON BEHALF OF THE AMERICAN TOBACCO COMPANY AND R. J. REYNOLDS TOBACCO COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The case as presented to this Court by the petition for a writ of certiorari really presents a question of fact only; for, if the S. S. "Katingo Hadjipatera", requisitioned only for "possession and use" (R. 89, see Finding No. 4 in the attached Appendix), was not at the time of filing of the libel *in the possession of the Greek Government*, then, since the requisition was *in invitum*, under the decision of this Court in *The Navemar*, 303 U. S. 68, the vessel was not immune from arrest.

The District Court, in an elaborate set of findings, not only found that the S. S. "Katingo Hadjipatera" was not in the possession of the Greek Government, but, also, after carefully examining all of the surrounding circumstances, it found facts which clearly supported its finding as to this master fact, viz., that the Greek Government postponed taking control of the vessel until she rid herself of her cargo. The Greek Government's purpose in thus delaying taking possession and control of the vessel is easily understandable, since, if it had taken possession and control of the vessel before the cargo was discharged, it would have subjected itself to claims of a most embarrassing nature.

As the findings of the District Court were not numbered at the time of their filing, for convenience of the Court we have printed them as an appendix to this brief, with numbers which can be used for ready reference. The references to the record at the end of each finding refer to the findings as signed by the District Judge and to the testimony supporting such finding.

On appeal the Circuit Court of Appeals affirmed the decree below on the opinion of the District Court, which it thus adopted. Therefore, the case comes here on facts concurrently found by the District Court and the Circuit Court of Appeals which we respectfully submit do not present any new question for decision by this Court. This Court has repeatedly stated that it would not disturb findings concurrently found by lower courts. *Friendship II*, 61 S. C. Rep. 687, 690; *U. S.* v. *O'Donnell*, 303 U. S. 501, 508; *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U. S. 502, 510.

POINT I.

There is not any conflict between the decision below and any decision of this Court nor with any decision of any Circuit Court of Appeals.

The petitioner does not suggest that there is any conflict between the decision below and that of any other Circuit Court of Appeals. It does say, however, that there is a conflict between the decision below and the decision of this Court in *The Navemar*, 303 U. S. 68; *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562 and in *Ex Parte Muir*, 254 U. S. 522. It has failed, however, to indicate where any such conflict exists. In *The Navemar*, 303 U. S. 68, at page 75, this Court laid down the law thus:

> "The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum, actual possession by some act of physical dominion or control in behalf of the Spanish Government*, was needful, *The Davis*, 10 Wall. 15, 21; *Long* v. *The Tampico*, 16 Fed. 491, 493, 494; *The Attualita, supra; The Carlo Poma*, 259 Fed. 369, 370, reversed on other grounds, 255 U. S. 219, or at least *some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government.* Both were lacking, as was support for any contention that the vessel was in fact employed in public service. See *Long* v. *The Tampico, supra*, 493, 494; cf. *Berizzi Bros. Co.* v. *The Pesaro, supra.*" (Italics ours.)

Since both Courts below concurrently found that the "Katingo Hadjipatera" was never in the actual possession of the Greek Government and was never subject to any act of physical dominion or control in behalf of the Greek Government (see Appendix, Findings 4-19 inclu-

sive), the order of requisition did not operate to change the status of the vessel from that of a private vessel to that of a public vessel. *The Navemar, supra.* Neither in *Ex Parte Muir,* 254 U. S. 522, nor in *Berizzi Bros. Co.* v. *S. S. "Pesaro",* 271 U. S. 562, is there any expression of the Court which in any way conflicts with the law as thus stated in *The Navemar.*

Concerning the passages from the testimony of Captain Courbellis and Captain Skinitis, referred to at pages 17, 18 and 19 of the brief of the petitioner, it is sufficient to say that Captain Courbellis never contended that the Greek Government had taken possession or control of the S. S. "Katingo Hadjipatera". On the contrary, he testified that Captain Skinitis, the master of the vessel, told him that *"The steamer will be given to the possession of the Greek Government after she would be discharged"* (R. 84). Captain Skinitis testified that, in answer to the letter through which Captain Courbellis conveyed to him the information that the vessel had been requisitioned, he said: "I told him that I received his letter as regards to requisition of the ship and *as soon as the ship discharges, I will be at his orders"* (R. 92).

The District Court both saw and heard these witnesses, and we submit that in the light of this testimony, it was clearly correct in finding that the "Katingo Hadjipatera" was never in the possession of the Greek Government and was not under its orders because the "Katingo Hadjipatera" had not been discharged at the time suit was brought.

In *The Carlo Poma,* 259 F. 369, the Circuit Court of Appeals for the Second Circuit said (p. 370):

> "The law of the United States is the same [as that of England], except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, *but also upon the actual possession* by the sovereign of the property *at the time process is*

served. The Davis, 10 Wall. 15; *Long* v. *The Tampico,* 16 Fed. 491; *The Attualita,* 238 Fed. 909." (Italics ours.)

This case was cited with approval in *The Navemar,* 303 U. S. 68 at page 75.

The proposition stated in Point I of the brief filed in support of the petition is, therefore, irrelevant, because it is in no way applicable to the facts here presented. The findings below establish that the "Katingo Hadjipatera" was never in the possession of the Greek Government and was never in its service.

POINT II.

The questions as presented by the petition have all either been answered by this Court in previous cases, or they present questions of fact only.

At pages 7 and 8 of the petition the petitioner lists some nine questions to be presented to this Court.

Question No. 1 was answered in the negative by this Court in *The Navemar,* 303 U. S. 68. This Court held that a decree of attachment, without more, was insufficient to constitute a vessel a public vessel, and that in order to make a vessel immune from suit, actual possession by some act of physical dominion or control in behalf of the foreign government claiming immunity was needful. In order to obtain physical possession, as this Court stated in *The Navemar,* there must be either actual possession by some act of physical dominion or control. When the master stated that he did not recognize the control until after the vessel was discharged of her cargo, obviously the vessel did not enjoy the immunity of a public vessel until her cargo had been discharged. The vessel's cargo was not discharged until long after suit was brought.

Question No. 2 does not accurately present the facts in the case. (See Appendix, Findings 1-19.) Moreover, in *The Navemar*, 303 U. S. 68, 73, this Court enumerated findings almost identical with those set forth by petitioner in its question 2, and held that such facts were sufficient to establish that a vessel, although requisitioned by a decree taking title, and not merely use, as was the case here, was still in the possession of her owners. The facts enumerated by this Court in *The Navemar* were as follows:

> "(1) None of the consular officers mentioned had done any act purporting to take possession of the vessel.
>
> (2) None of them had informed the master that he wished to take possession, or had any intention of doing so.
>
> (3) That the vessel had proceeded under the command of her master upon her voyage from Buenos Aires to New York, manned by officers and crew in the employ of the owner.
>
> (4) Upon arrival at New York, the master, under direction of the ship's agent, had discharged cargo.
>
> (5) That before discharge the freight money was paid by the consignees to the agents of the time charterer in New York."

Question No. 3 does not arise on the facts of this case. Captain Courbellis, as both courts below found, testified that he did not take physical possession of the ship and did not intend to take physical possession until the cargo had been discharged. Captain Skinitis, the master of the vessel, testified that he did not intend to give physical possession until the cargo had been discharged. Consequently, Question No. 3 as stated in the petition has no application to the facts of this case (Appendix, Findings 17, 18, 19).

Question No. 4 does not accurately present the facts of the case. Captain Skinitis, the master of the vessel, stated that he would not place himself at the orders of the Greek Government until after he had discharged his cargo (Appendix, Finding 18).

Question No. 5 has been answered in the negative by this Court. This Court held in *The Navemar* that attachment without more was insufficient to place a foreign government in possession of a vessel. *The Navemar*, 303 U. S. 68, at page 75.

Question No. 6. There was no evidence below which established that possession had been taken by the Greek Government. On the contrary, the evidence established the exact opposite (Appendix, Findings 17-19). Both Captain Skinitis and Captain Courbellis stated that the vessel would not be delivered into the possession of the Greek Government until after the cargo had been discharged (R. 84, 92, 96, 97).

Question No. 7. presents merely a question of fact. Moreover, counsel conceded in the court below that the Greek Government had no property in the S. S. "Katingo Hadjipatera". He stated in open court:

> "I don't think ever through the case we have questioned the matter of title. We haven't claimed that the title was transferred.
>
> The Court: By the requisition?
>
> Mr. Wolfe: Yes" (R. 97).

In the light of this statement of counsel, and of the evidence in the case, both courts below found that possession and use only of the vessel were requisitioned by the Greek Government (R. 108). Even Captain Courbellis, who represented the Greek Government, testified:

> "Q. Is it required that there be a change from the private owner to the government under a requistion? A. No, it is not necessary because the steamer be-

longs to the owner. It is not bought, it is not sold by [to] the government. Only the government uses the steamer, possesses and uses the steamer" (R. 89).

In the light of these findings and evidence we are unable to perceive how petitioner in its Question No. 7 can refer to the S. S. "Katingo Hadjipatera" as the property of the Greek Government. The plain fact is that its Question No. 7, does not relate to the facts of this case.

Question No. 8 is purely a question of fact, and the evidence in the case fully supports the concurrent findings of the District Court and of the Circuit Court of Appeals.

Question No. 9. The Circuit Court of Appeals applied the law as stated by this Court in *The Navemar*, 303 U. S. 68, and this question presents nothing to be considered by this Court.

POINT III.

The Court is under no duty to accept a claim of immunity without proof until such claim has been accepted by the executive branch of the Government. In the present case the Government has not accepted the claim of immunity presented by the Greek Government.

It is not until a "claim is recognized and allowed by the executive branch of the government" that it is the duty of the court to accept it. *The Navemar*, 303 U. S. 68, 74.

Even the statements contained in the note of the Greek Minister to the Secretary of State (R. 23), and submitted to the District Court by the United States Attorney, are not conclusive evidence of the facts set forth in the statement. Such evidence is subject to rebuttal. *United States* v. *Lee*, 106 U. S. 196, 204, 215, 219; *Tindal* v. *Wesley*, 167 U. S. 204, 218, 221, 224; *South Carolina* v. *Wesley*, 155 U. S. 542, 544, 545.

In order to determine the nature of the so-called "Suggestion of Immunity" submitted by the United States Attorney, it is only necessary to examine it. The circumstance that the United States Attorney calls his document "Suggestion of Immunity" is of no importance. Its nature must be determined from its content. From the document itself the following appears:

(1) That the United States Attorney is acting under the direction of the Attorney General (R. 19). [The actual direction of the Attorney General is not printed in the record.]

(2) The United States Attorney is directed to bring to the attention of this Honorable Court certain diplomatic representations concerning the status of the Greek steamer "Katingo Hadjipatera". A copy of the communication from the Secretary of State to the Attorney General is annexed to the suggestion and marked "Exhibit A" (R. 20). In that note the Secretary of State informs the Attorney-General that he has been requested by the Greek Minister to the United States to bring to the attention of the Court certain diplomatic representations concerning the status of the Greek steamer "Katingo Hadjipatera".

(3) The representations made on behalf of the Government of the Kingdom of Greece are set forth in a note (R. 23) dated March 13, a certified copy of which is annexed to the Secretary of State's note to the Attorney General, in which it is said that the steamer "Katingo Hadjipatera" has been requisitioned by the Greek Government for public use in the successful prosecution of the war in which the Greek Government is now engaged.

(4) The letter of the Secretary of State requests (R. 22) that the statements of the Government of Greece made in its behalf by the Greek Minister at Washington with regard to this vessel be brought to the attention of the Court.

(5) In bringing the matter to the attention of the Court, the United States does not intervene as an interested party, nor does the United States Attorney appear either for the United States or for the Government of the Kingdom of Greece, but the United States Attorney presents this suggestion as a matter of comity between the United States Government and the Government of the Kingdom of Greece (R. 19-20).

The contention was made that this suggestion from the United States Attorney constituted a decision by the executive branch of the United States Government that this vessel was immune, such as resulted in the release of the "Exchange" (*The Exchange*, 7 Cranch 116).

It is apparent from a comparison of the suggestion made by the United States Attorney in the case of *The Exchange*, 7 Cranch 116, at pages 118-19, and the suggestion in this case, that the two suggestions are in no way alike.

In *The Exchange*, the United States Attorney prayed that the Court would be pleased to order and decree that the process be quashed and that the libel be dismissed with costs, and *that the said public vessel be released. The Exchange*, 7 Cranch 116, 119.

Here the suggestion of the United States Attorney contains no prayer whatever; on the contrary, it disclaims any partisanship and says that the United States Attorney is merely bringing the matter to the attention of the Court "for such consideration as this Court may deem necessary and proper" (R. 20).

So that his meaning might be entirely clear the United States Attorney states (R. 19):

> "The representations made on behalf of the Government of the Kingdom of Greece are set forth in a note, dated March 13, 1941 * * *."

A certified copy of this note is annexed to the suggestion of the United States Attorney (R. 23), and the letter of the Secretary of State requesting the Department of Justice to bring this matter to the attention of the Court is also annexed (R. 20). In the letter of the Secretary of State directed to the Attorney General, it is expressly stated (R. 22):

> "I shall appreciate it if at the earliest possible moment you will instruct the appropriate United States Attorney to appear in proceedings against this vessel in the United States District Court for the Southern District of New York and present to the Court the enclosed certified copy of the note of the Greek Minister, with its enclosures, *without argument or comment* on his part, other than to state that the statements of the Government of Greece made in its behalf by the Greek Minister at Washington are brought to the attention of the Court as a matter of comity between the Government of the United States and the Government of Greece." (Italics ours.)

The distinction between the suggestion in *The Exchange* and the suggestion here is clearly pointed out in the case of *The Attualita*, 238 F. 909, by the Circuit Court of Appeals for the Fourth Circuit, where it said:

> "The steamship says that in any event her right to immunity is a political question, which has been passed upon by the executive branch of the government. A comparison of the suggestion which was filed in *The Exchange*, 7 Cranch 116, 3 L. Ed. 287, with that in this case, shows quite clearly that, *while in The Exchange the executive demanded the ship's release, it has in this case carefully refrained from doing anything of the kind*" (238 F. at p. 911). (Italics ours.)

It should be observed that one of the grounds upon which certiorari was granted in *The Navemar*, 303 U. S. 68, at page 71, was a conflict between the Fourth Circuit (*The Attualita*) and the decision of the Circuit Court of Appeals for the Second Circuit in *The Navemar*, 90 F. (2d) 673. This Court in *The Navemar*, 303 U. S. at page 75, adopted the view expressed in *The Attualita*. In other words, when a court receives a suggestion like that tendered to the court here, such a document merely brings to the Court's attention certain facts which the Attorney General requests shall be received, *Stanley* v. *Schwalby*, 162 U. S. 255, at page 270; whereas in *The Exchange*, the executive branch made the formal request that the process be quashed, the libel dismissed, and the public vessel be released.

In the present case the District Court, in deference to the earnestness with which counsel for appellant pressed this argument, requested the executive branch to inform it whether the executive branch "expressly recognizes the Greek Government's claim of sovereign immunity of the vessel from process in accordance with the practice suggested by the Supreme Court in *Ex Parte Muir*, 254 U. S. 522" and added "that if a further communication from the State Department is not submitted the Court is inclined to require proof" (R. 55). In response to this request, the executive department said:

> "The position of the Department as set forth in its letter of March 14, 1941, to you in regard to this vessel is similar to that which has been taken by it in other cases involving the question of the requisition of merchant vessels by foreign governments.
>
> While the Department of State is desirous that the Greek Government should obtain promptly possession of all vessels to which it is entitled it feels that the question of the status of the 'Katingo Hadjipatera' is one for judicial determination" (R. 55).

Clearly, after receipt of this communication, no further serious contention could be made that the executive branch had decided that the vessel was immune. The executive branch of the United States Government, having relegated the Greek Government to its remedy of establishing by evidence that the S. S. "Katingo Hadjipatera" was in the actual possession and under the control of the Greek Government at the time of her arrest, and both Courts below having found that the vessel was not in the possession nor under the control of the Greek Government at the time of her arrest, no question is presented on this record for review by this Court.

POINT IV.

When a court appears to have all the elements of jurisdiction, a sovereign who would oust the jurisdiction must furnish proof to support its claim.

In *Puente* v. *Spanish Nat. State,* 116 F. (2d) 43, 45, the Circuit Court of Appeals for the Second Circuit has recently said:

> "When a court appears to have all the elements of jurisdiction of an action, it is not improper to require of even a sovereign who would oust it of that jurisdiction that he furnish due proof to support his claim. The explanation appears in *Ex Parte Muir, supra,* 254 U. S. at page 532, 41 S. Ct. at page 187, 65 L. Ed. 383, where it is said: '*Prima facie* the District Court had jurisdiction of the suit and the vessel [case cited], and to call that jurisdiction in question was to assume the burden of showing what was in the way of its existence or exertion. Merely to allege that the vessel was in the public service and under the control of the British Government as an admiralty transport was not enough. These were matters which were

not within the range of judicial notice and needed to be established in an appropriate way."

In other words, in a case of this character it must be kept in mind that a contention that a vessel is immune from jurisdiction, amounts to an assertion of an exception to the general rule, which is that when a merchant vessel of a foreign nation enters our waters, she submits herself to the jurisdiction of our Courts.

The general rule is that the jurisdiction of a nation within its own territory, is exclusive and absolute. Any restriction upon the jurisdiction is an exception to the general rule. *The Exchange,* 7 Cranch 116, 135.

> "The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, *its extent must be regulated by the nature of the case,* and the views under which the parties requiring and conceding it, must be supposed to act.
>
> When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the

country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption." *The Exchange,* 7 Cranch 116, 143-4. (Italics ours.)

See also to the same effect, *United States* v. *Dickelman,* 92 U. S. 520, 525, where this Court said:

"The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty."

Wildenhus's Case, 120 U. S. 1, 11;
Cunard S. S. Co. v. *Mellon,* 262 U. S. 100, 124, 125;
Uravic v. *Jarka Co.,* 282 U. S. 234, 240.

This suit is for damage to cargo carried by a vessel under contracts of affreightment (R. 5, 6) and in such a suit the owner of damaged cargo has a lien on the ship because she has been impliedly hypothecated to answer for non-performance of the contract of carriage. This Court has said:

"that the right to the lien [sought to be enforced by the suit] has its source in the contract of affreightment and that the lien itself is justified as a means by which the vessel, treated as a personality or as impliedly hypothecated to secure the performance of the contract, is made answerable for nonperformance."

Krauss Bros. Co. v. *Dimon S. S. Corp.,* 290 U. S. 117, at page 121.

Hence, when libellants filed their libel against S. S. "Katingo Hadjipatera", they were asserting a well established property right against that vessel. They should not be deprived of that right except on clearest proof, proof satisfactory to the court that the vessel, S. S. "Katingo

Hadjipatera", was *held and used* for a public purpose, and that it had been *acquired, manned and operated* by the Greek Government in the carrying trade. See *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U. S. 562, at page 574.

CONCLUSION.

It is respectfully submitted that the application for certiorari should be denied.

Respectfully submitted,

T. CATESBY JONES,
HENRY N. LONGLEY,
Proctors for The American Tobacco Company and R. J. Reynolds Tobacco Company.

JOHN W. R. ZISGEN,
Of Counsel.

Appendix.

In the petition and brief there is no mention of the fact that there were concurrent findings of fact made by the District Court and the Circuit Court of Appeals. These concurrent findings are as follows:

1. Exhibit 1, a letter from Captain Courbellis, a representative of the Greek Government, addressed to Captain Skinitis, master of the "Katingo Hadjipatera" (translation, marked Exhibit 1A, is printed at R. 28) was delivered to the Captain of the "Katingo Hadjipatera" on February 26, 1941. At about 3:15 P. M. that day the Captain of the "Katingo Hadjipatera" telephoned to Captain Courbellis in New York, acknowledging receipt of this letter (R. 108) (Skinitis, R. 91, 92; Courbellis, R. 73).

2. A translation of Exhibit 1 referred to in the finding which we have marked (1) is printed in the Court's decision at page 109 of the record, and reads as follows:

> "To the Captain of the SS 'Katingo Hadjipatera', c/o T. Parker Host, c/o Terminal Building, Newport News, Virginia.
>
> Following a cabled order of the Greek Legation in London dated February 22, 1941, your boat has been requisitioned to transport cargo belonging to the Greek Government to Piraeus. As soon as you have unloaded your present cargo sail to the Port of New York to take on this new shipment. Agents for this shipment are the Greek Line, 10 Bridge Street, New York City. Kindly acknowledge receipt of this letter."

No other communication from the Greek Government was sent to Captain Skinitis until March 12, 1941, five days after the vessel was taken into the custody of the Court (R. 109-110, 1).

3. The title of the vessel was not requisitioned by the Greek Government (R. 108) (Courbellis, R. 89; Statement of Proctor for Appellant, R. 97).

4. The possession and use only of the vessel were requisitioned by the Greek Government (R. 108) (Courbellis, R. 89; Statement of Proctor for Appellant, R. 97).

5. Possession and use were to be given to the Greek Government pursuant to such requisition after the delivery of the cargo which the "Katingo Hadjipatera" had aboard at the time she was requisitioned (R. 108) (R. 28; Courbellis, R. 73, 74, 84; Skinitis, R. 92).

6. When the "Katingo Hadjipatera" arrived in the United States she had a varied cargo, mostly tobacco (R. 108) (R. 40).

7. During the voyage a fire developed in one of the vessel's holds (R. 108) (R. 36, 45, 46).

8. Part of the cargo was discharged at Newport News, part at Norfolk, and thereafter the vessel sailed for New York, about midnight March 5, 1941 (R. 108) (R. 47, 48, 49, 50, 52).

9. The vessel arrived at New York on March 7, 1941, and a libel was filed on that date (R. 108) (R. 53, 1).

10. When the vessel arrived at Newport News she was assisted by the Agent for the owners of the steamer, the three individual respondents named in the libel (R. 110) (R. 96).

11. Papers necessary to enter the vessel in the Custom House at both Newport News and Norfolk were filed on behalf of these respondents (R. 110) (R. 95, 97).

12. Bunkers were furnished to the vessel and

payment made on account of expenses from the ship's moneys (R. 110) (R. 96, 101, 102).

13. No endorsement was made, either upon the manifest or ship's register, or any other document of the ship, to indicate that there had been any transfer or change of title to the vessel (R. 110) (R. 95, 97).

14. The vessel was entered at the Custom House in New York by Agents for the charterer (R. 110) (R. 98; Exhibit A).

15. The pier to which the vessel went in New York was the pier of Messrs. Garcia & Diaz, who were Agents for the Hellenic Line, the charterers of the vessel (R. 110) (R. 83, 80).

16. At the time the vessel was in New York, she had cargo for New York and also for a further port, to wit, Camden, New Jersey (R. 110) (R. 84, 74).

17. The Greek Government did not take physical possession of the vessel at any time prior to the filing of the libel or the seizure of the vessel under the libel or the writ of attachment (R. 110) (R. 73-74, 81).

18. The Captain of the vessel did not on behalf of the Greek Consul or the Greek Government take possession of the vessel prior to the filing of the libel and the seizure of the vessel by the United State Marshal for the Southern District of New York (R. 110) (R. 91-92).

19. It was the intention and purpose of the Greek Government, and it was the understanding of the master of the vessel, that possession of the vessel for the Greek Government was not to be taken, and the master was not to follow the orders of the Greek Government with respect to the vessel and her operations, until after the westbound cargo of the vessel had been discharged (R. 111) (R. 73-74, 81, 92).

FILED
MAY 20 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 1051

K. DIAMANTOPOULOS, Minister to the United States for the Kingdom of Greece,

Petitioner,

against

THE AMERICAN TOBACCO COMPANY and R. J. REYNOLDS TOBACCO COMPANY, *et al.*

MOTION REQUESTING COURT TO CONSIDER IMMEDIATELY PETITION FOR WRIT OF CERTIORARI AND IF WRIT IS GRANTED TO DETERMINE THE CASE IMMEDIATELY UPON THE PETITION, RECORDS AND BRIEFS AS FILED, WITHOUT ORAL ARGUMENT.

CARVER W. WOLFE,
Proctor for Petitioner.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

K. DIAMANTOPOULOS, Minister to the United States for the Kingdom of Greece,

Petitioner,

against

THE AMERICAN TOBACCO COMPANY and R. J. REYNOLDS TOBACCO COMPANY, *et al.*

Notice of Motion.

Sirs:

PLEASE TAKE NOTICE that on the 26th day of May, 1941, the within motion will be submitted to the Supreme Court of the United States:

1. That the Supreme Court of the United States determine before adjournment of the present term whether a Writ of Certiorari shall issue in the above entitled matter to the United States Court of Appeals for the Second Circuit directing it to send to this Court the transcript of records in this matter, and

2. That the Supreme Court of the United States, if it grant the petition for a Writ of Certiorari, at the same time

determine on the printed records and briefs as filed, without oral argument, the merits of the case.

A printed copy of the aforementioned motion is served upon you herewith.

(Signed) CARVER W. WOLFE,
Counsel for Petitioner.

Service accepted this
19th day of May, 1941.

(Signed) T. Catesby Jones
Henry V. Gorsuch
Counsel for Respondents.

Affidavit of Carver W. Wolfe.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1940.

No. .....

K. DIAMANTOPOULOS, Minister to the United States for the Kingdom of Greece,

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THE AMERICAN TOBACCO COMPANY and R. J. REYNOLDS TOBACCO COMPANY, *et al.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CARVER W. WOLFE, being duly sworn deposes and says: I am counsel for Cimon Diamantopoulos, Minister to the United States for the Kingdom of Greece, in the above entitled matter.

There is presented to this Court for determination a question of sovereign immunity involving a Greek vessel, which although urgently needed by the Greek Government for war purposes has been seized by the United States Marshal in the Southern District of New York and is now in his custody.

This is a proceeding in Admiralty begun by the filing of a libel for cargo damage, in the United States District Court for the Southern District of New York, by The

American Tobacco Company, claiming damage in the amount of $185,000.00 and R. J. Reynolds Tobacco Company, claiming damage in the sum of $200,000.00.

The libel was *in rem* against the S.S. *Katingo Hadjipatera* and *in personam* against J. C., N. C., and A. C. Hadjipateras, as owners and operators of the S.S. *Katingo Hadjipatera,* with a Writ of Foreign Attachment.

The S.S. *Katingo Hadjipatera* is a Greek vessel, of 3,661 gross tons, 351.7 feet in length, 51 foot beam and 23.9 feet depth.

The libel herein was filed on the 7th day of March, 1941 and process issued against the vessel on the same day, and the vessel was immediately taken into custody by the United States Marshal for the Southern District of New York. The vessel, ever since being seized by the Marshall has been and now is in his possession although urgently needed by the Greek government for war purposes.

By cable from the Greek Minister in London, dated February 22nd, 1941, Captain Courbellis Director of the Mercantile Marine Division of the Greek Consulate General was notified that the Greek Steamship *Katingo Hadjipatera* had been requisitioned by the Greek Government. Thereafter on February 25th, 1941 Captain Courbellis, by letter, notified the Master of the vessel that his vessel had been requisitioned by the Greek Government. This notice was received by the Master of the vessel, Captain Skinitis, on the arrival of the vessel at Newport News, Virginia on February 26th, 1941 and in a telephone conversation to Captain Courbellis on that same day, Captain Skinitis acknowledged receipt of the notice and accepted the requisition.

On March 13th, 1941 the Greek Minister to the United States, made representations to the Secretary of State with regard to the vessel, claiming sovereign immunity.

On March 14th, 1941, the Honorable Cordell Hull, Secretary of State of the United States, transmitted to the Attorney General of the United States the note of the Greek Minister suggesting that the Attorney General instruct the appropriate United States Attorney to appear in the proceeding:

> "* * * without argument or comment on his part other than to state that the statements of the Government of Greece made in its behalf by the Greek Minister at Washington are brought to the attention of the Court as a matter of comity between the Government of the United States and the Government of Greece."

On March 14th, 1941 Judge Leibell signed an order to show cause, stating as follows:

> "* * * Why an order should not be made and entered herein dismissing the suit of American Tobacco Company and R. J. Reynolds Tobacco Company against the Steamship *Katingo Hadjipatera,* her engines, boilers, etc., and J. C., N. C. and A. C. Hadjipateras, and order wholly dismissing the above entitled suit for want of jurisdiction on the ground that said suit is brought against property of a friendly sovereign nation not subject to the jurisdiction of this court, and immune from suit in this court. * * *"

Thereafter the United States Attorney for the Southern District of New York, under date of March 17th, 1941, filed a suggestion of sovereign immunity stating:

> "* * * The undersigned presents this suggestion as a matter of comity between the United States Government and the Government of the Kingdom of Greece for such consideration as this Court may deem necessary and proper."

On March 21st, 1941 the Acting Secretary of State transmitted a note to the Attorney General at the request of the District Court, in which it was stated:

> "The position of the Department as set forth in its letter of March 14th, 1941 to you in regard to this vessel is similar to that which has been taken by it in other cases involving the question of the requisition of merchant vessels by foreign governments."

On March 24th, 1941 Judge Leibell heard testimony on the issue:

> "* * * Whether or not the master was served with a notice that the vessel had been requisitioned by the Greek Government and, if so served, whether he took actual possession of the vessel on behalf of the Greek Government, and when and where and by what means he did so."

On March 25th, 1941 Judge Leibell orally made his findings of fact and conclusions of law, the nub of which was that the vessel had been requisitioned as of February 26th, 1941 when the said requisition was accepted by the master but that the requisition was not to take effect, however, until the west bound cargo had been discharged. Upon the findings of fact and conclusions of law of Judge Leibell an order was entered from which an appeal was taken by the Greek Minister to the Circuit Court of Appeals for the Second Circuit.

In view of the urgent need of shipping and in further view of the fact that the vessel was under arrest, the Circuit Court of Appeals immediately set the case for argument and heard the argument on the day that the record was filed.

The Circuit Court of Appeals on the 23rd day of April handed down its decision, affirming the decision of the Dis-

trict Court. The order affirming the judgment of the District Court was entered May 9th, 1941. A petition for a writ of certiorari was filed with this court on May 13th, 1941.

From the above statements of facts it will be seen that the petitioner has used the utmost diligence to have the question of sovereign immunity determined immediately. The libel was filed on March 7th, 1941, and the vessel seized on that day; representations were made to the Department of State; the matter was heard and decided by the District Court and the Circuit Court of Appeals and a petition for a writ of certiorari filed with the Supreme Court of the United States on May 13th, 1941.

The S.S. *Katingo Hadjipatera* is a cargo vessel urgently needed by the Greek Government for its war purposes. As the matter now stands the vessel is under arrest and should the merits of the question of sovereign immunity not be immediately determined, it will continue in the custody of the Marshal, thus withdrawing from service tonnage which, in view of the war conditions, cannot be spared.

In view of the urgency of the situation, I request that the court immediately examine the petition for a writ of certiorari filed herein and that it determine whether it will grant the petition and that it consider and determine the merits of the questions presented, on the briefs and record already filed, and without oral argument, so that a decision may be had before this court adjourns on June 2nd, 1941.

CARVER W. WOLFE.

Sworn to before me this
19th day of May, 1941.

ALICE S. DOYLE
Notary Public, Kings County
Kings Co. Clk's No. 52 Reg. No. 2055
N. Y. Co. Clk's No. 102 Reg No. 2D91
Commission Expires March 30, 1942

(SEAL)